PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 52

ELIJAH McNEAL, JR.,

Petitioner,

v.

R. O. CULVER, as State Prison Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Supreme Court of Florida (R. 49-51) is reported at 113 So. 2d 381.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). On July 1, 1959, the Florida Supreme Court rendered its final judgment rejecting petitioner's claim that he is imprisoned in violation of the due process clause of the Fourteenth Amendment (R. 49-51). Petitioner's motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari were filed on September 14, 1959. This Court granted the motion and petition on March 7, 1960.

Constitutional and Statutory Provisions Involved

The Constitutional and statutory provisions involved are set forth in the Appendix. This case involves Section 1, Fourteenth Amendment, Constitution of the United States and the following Florida Statutes:

2 Fla. Stat. 1957, p. 2797, Sec. 782.04 (MURDER)

2 Fla. Stat. 1957, p. 2798, Sec. 782.07 (MANSLAUGHTER)

2 Fla. Stat. 1957, p. 2800, Sec. 784.01 (MAYHEM)

2 Fla. Stat. 1957, p. 2800, Sec. 784.02 (PUNISHMENT OF ASSAULT)

2 Fla. Stat. 1957, p. 2800, Sec. 784.03 (PUNISHMENT OF ASSAULT AND BATTERY)

2 Fla. Stat. 1957, p. 2800, Sec. 784.04 (AGGRAVATED ASSAULT)

2 Fla. Stat. 1957, p. 2800, Sec. 784.05 (PUNISHMENT FOR CULPABLE NEGLIGENCE)

2 Fla. Stat. 1957, p. 2800, Sec. 784.06 (ASSAULT WITH INTENT TO COMMIT FELONY)

2 Fla. Stat. 1957, p. 2949, Sec. 917.01 (EXAMINATION OF DEFENDANT'S MENTAL CONDITION TO DETERMINE WHETHER HE SHALL BE TRIED)

2 Fla. Stat. 1957, p. 2957, Sec. 921.03 (JUDGMENT ON INFORMAL VERDICT)

Question Presented

While petitioner was not represented by counsel, the State of Florida tried, convicted and imposed a twenty-year sentence on him for "Assault to Murder in the Second Degree." The Florida Supreme Court then held, in a habeas corpus proceeding, that petitioner need not and would not be afforded any hearing or other opportunity to prove that his conviction without counsel denied him due process. The record in the habeas corpus proceeding contained a controverted, but not disproven, allegation that the trial judge denied petitioner's request for counsel and told him he would not need a lawyer. The record also contained a partial transcript of the trial proceedings which was attached to the respondent's return. This transcript showed that:

1. When tried, petitioner was an ignorant, twenty-nine year old Negro. At age twenty-three he suffered head injuries which left him subject to black-out spells. At age twenty-eight he received six months' treatment for these injuries in a veterans' hospital, spending four months locked in a "psycho" ward. After his mother signed some type of guardianship papers, he was released from the hospital. He committed his alleged assault some 13 months later.
2. Petitioner's trial involved complicated substantive issues and difficult evidentiary problems; and
3. The prosecution, without interference from the trial judge, took unfair advantage of petitioner's inability to defend himself.

On these facts, did the Supreme Court of Florida deny petitioner due process when it denied him a hearing in the habeas corpus proceeding?

Statement of the Case

Petitioner is presently serving a twenty-year sentence for "Assault to Murder in the Second Degree" (R. 22-23). He was found guilty of this supposed offense by a judge and jury in the Criminal Court of Record in and for Polk County, Florida (R. 22-23). His trial began and ended on the same day, February 26, 1958 (R. 22, 24). He was admittedly tried, convicted and sentenced while unrepresented by counsel.

The constitutional fairness of the state action which imprisons the unrepresented petitioner must be measured by the facts which follow. Most of these facts are shown by the trial transcript. A few are controverted allegations which must be considered true under this Court's decision in *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116.

Petitioner's Background

Elijah McNeal, Jr., is a Negro (R. 2). He was twenty-nine years old (R. 41) when sentenced to twenty years at hard labor (R. 22-23). When tried, he neither knew nor understood court procedures; and did not "know how to defend himself and establish his innocence" (R. 2, 7, 9). He had never been in court before (R. 9, 2, 7).

McNeal's educational background is not disclosed by the record. However, the following language from his trial testimony sheds light on the extent of his formal education:

"... when I gets excited, I blacks out" (R. 38).

"I had it because I throwed it down myself" (R. 38).

"... they was not too bad" (R. 37).

"... without no shirt and no shoes" (R. 37).

"It's kept in a room with a twenty-two rifle I got to the house" (R. 39).

"I goes and I gets pills" (R. 42).

McNeal received head injuries in 1952, while in the Army (R. 42, 37). Since that time he has been subject to "blackout spells" when he gets excited or "over-headed" (R. 37-38). On April 8, 1956, he commenced six months' treatment for these injuries at the veterans' hospital in Bay Pines (R. 37, 42). The nature of this treatment is described in the record as follows:

> "When I was in the hospital, I stayed over there four months locked in the ward, psycho part of it; and the four months I was over there, I had to stay in there locked up all the time. Mama was the only one that could come and see me. And, well, about the latter part of the four months he give me a weekend pass. He was trying me to see if I would come back.
>
> And I went home and I come back on time. And I asked mama to come and sign for me as that was the only way I could get back. I had to have a guardian to sign. And she come over there that day and begged the doctor to let me go home" (R. 42-43).

McNeal's release from the "psycho" ward came some thirteen months before the alleged misdeeds for which he is presently confined (R. 37, 35). During this interval, he would return to the hospital and "get pills" (R. 42).

Arrest and Arraignment

McNeal was arrested within minutes after commission of his alleged offense (R. 30-31). Two of the state's four witnesses testified these events occurred on November 10,

1957 (R. 24, 35). The other two witnesses testified to a December 10, 1957 date (R. 29, 33). The date alleged in the information is not known since the state did not place a copy of the information in the record. The date McNeal was informed against is likewise unknown.

McNeal was arraigned sometime prior to January 20, 1958 (R. 23). At the arraignment, he admitted identity and pled not guilty to an information which apparently charged him with "Assault to Murder in the First Degree" (R. 23).

Trial and Conviction

McNeal's trial began and ended on February 26, 1958 (R. 22, 24). At the outset, the trial judge asked McNeal if he had a lawyer (R. 2). McNeal replied in the negative and requested the court to appoint someone to represent him (R. 2). The trial judge denied this request, saying:

1. "... since this is not a capital offense you are not entitled to a court appointed attorney" and
2. "... you won't need a Lawyer in this case. ... " (R. 2).

The state called four witnesses who produced twelve pages of testimony (R. 24-36). McNeal asked two questions and obtained two answers from the first witness, a Negro named Scurry (R. 28). McNeal's third "question" was precluded by the judge (although not objected to by the state) because "that is testifying, and it isn't time for you to testify" (R. 28). This "testimony" question was the last question McNeal asked at his trial. He asked no more questions of Scurry; and did not cross-examine the remaining three witnesses, Deputy Sheriff Neal (R. 36) and police officers Fields (R. 32) and Branch (R. 34).

When the state rested the following occurred in the jury's presence:

"Mr. Kelly: The State rests its case, Your Honor.

The Court: All right, now, Elijah, that is the State's case. If you want to, you can take the stand and tell your side of it. If you don't want to, you don't have to; because the burden is on the State to prove your guilt and not upon you to maintain your innocence. If you don't take the stand and testify, I will instruct the jury that they cannot consider that as any evidence of your guilt whatsoever. If you do take the stand and testify, then the State has a right to cross examine you. Do you want to tell your side of it?

Defendant: Yes, sir.

The Court: All right" (R. 36).

McNeal then took the stand. He gave a little over a page of direct testimony during which time the following incident took place:

"And it was the 8th of April, 1956, that I went over for treatment and stayed over there six months; and they sent me a paper that stated it was service connected and I could come to the hospital any time. And I lost that, and can I give you that one? (Handing paper to the Judge.) That paper is a statement from the doctor that examined me before I went to the hospital, and he give me that to bring over. It is a statement that I do have occasion to have blackout spells.

The Court: This statement would not be admissible. You could put the doctor on and have him testify; but we cannot admit any statement like this. We will allow you to testify about it. . . ." (R. 37)

When McNeal's cross-examination was over, the following occurred:

"The Court: Now, Lige, if you had an attorney, he would argue the case before the jury, what is called the opening argument and the closing argument. You can get up and talk to them first and then State will argue and then you will have the closing argument, if you wish to argue to them, plead your case.

Defendant: Well, sir, I don't quite understand the meaning of that.

The Court: Well, suppose you let the state make their argument and you listen now, pay close attention to what Mr. Kelly has to say for the State, and then you can get up here and answer him.

(Mr. Kelly argued on behalf of the State)

The Court: Now Lige, do you want to make any argument to them?

Defendant: No, sir" (R. 43).

The trial transcript ends with the above question. What, if anything the judge charged the jury is unknown. The judgment of conviction entered March 31, 1958, recites that the jury "rendered a verdict of guilty on February 26, 1958 to the offense of Assault to Murder in the Second Degree" (R. 22).

Sentencing and Commitment

As hereafter shown, the maximum possible sentence in Florida for any type of assault is twenty years at hard labor. On March 31, 1958, McNeal was sentenced to twenty years at hard labor (R. 22-23). He was sent to state prison in April of 1958 (R. 21-22).

Habeas Proceedings Below

On March 31, 1959, eleven months after his commitment, McNeal filed a petition for writ of habeas corpus in the

Supreme Court of Florida (R. 1). The crucial factual allegations of the petition are these:

> ". . . The petitioner is a Negro age 30 and never before appeared in any court on a felony, and did not understand court procedure or know how to defend himself and establish his innocence. At the commencement of trial Judge Roy H. Amidon, asked the petitioner if he had an attorney, petitioner answered no. And requested the court to appoint someone to represent him. The Court answered if the charge was a capital offence, I would appoint you an attorney, but since this is not a capital offence you are not entitled to a court appointed attorney and you won't need a Lawyer in this case, and then informed your petitioner he would be allowed to question the witnesses and also informed me I could take the witness stand in my behalf, but I would be questioned and crossed examined by the County Solicitor. Petitioner asked the Court if he could have a copy of the Information and a list of the State witnesses, the Court said that would not be necessary as the Information would be read to him, and that I would see all the witnesses when they took the stand. Thereupon, the State picked a Jury of six, and the County Solicitor, read the Information and the trial began. . . . " (R. 2)

The Florida Supreme Court issued the writ on April 7, 1959 (R. 15, 16). Respondent filed his return on April 16, 1959 (R. 16, 17-43). Four exhibits were attached to the return; the commitment to custody (R. 21-22), the judgment of conviction and sentence (R. 22-23), the minute book notation concerning arraignment (R. 23), and a partial transcript of the trial proceedings (R. 24-43).

The return denied that "the trial court refused to furnish petitioner a copy of the information . . . as no such

alleged refusal appears either in the court minutes reflecting the arraignment of petitioner nor in the trial record of this cause" as shown by the attached exhibits (R. 18). The return then went on to argue that petitioner waived his right "by his failing to make timely request for a copy of such charging document", and that the error, if any, was "absolutely harmless" (R. 18-19).

McNeal's allegations concerning his trial without counsel were "denied" by the following language in the return:

> "Respondent denies that petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf.
>
> In this regard, the record reflects that no capital offense was involved; that the trial judge scrupulously protected the rights of the petitioner throughout the trial of this cause; that the petitioner effectively represented himself to the end that a verdict for a lesser offense was returned from that with which he was charged; and the law on this point being so well settled in Florida, it is considered unnecessary to discuss this question further" (R. 19-20).

Supreme Court of Florida Opinion

On July 1, 1959, the Florida Supreme Court discharged the writ and remanded petitioner to custody without affording him any hearing or other opportunity to prove the allegations of his petition. It reached the following conclusion regarding McNeal's right to counsel:

> "Nothing whatever appears in this record of the trial to show whether or not any request was made of the trial judge to appoint counsel to aid the petitioner in his defense. No obligation is put upon a trial judge by statute to appoint an attorney for an accused except in capital cases. Sec. 909.21, Florida Statutes 1955,

and F.S.A.; Johnson v. Mayo, 158 Fla. 264, 28 So. 2d 585, certiorari denied 329 U.S. 804, 67 S. Ct. 492, 91 L. Ed. 687; Johnson v. Mayo, Fla., 40 So. 2d 134, and no absolute responsibility rested on the judge trying the case to inquire about the wish of the defendant to have the services of legal counsel. Bute v. People of State of Illinois, 333 U.S. 640, 644, 68 S. Ct. 763, 92 L. Ed. 986, although we have recognized the practice of asking a defendant whether or not he desired a lawyer and of providing one if that was his wish. Sneed v. Mayo, Fla., 66 So. 2d 865.

Not only was there a lack of evidence in the record indicating that the petitioner was unable to defend himself but circumstances are reflected showing that we should indulge the presumption that the contrary was the case. The charge was simple and so was the evidence introduced to support it.

After the petitioner had an altercation with the proprietor in an establishment that appears to have been a 'jook', called the 'Blue Chip', he withdrew to his quarters, and, more effectively to renew the feud, reappeared armed with a shotgun loaded with fine shot. When he was within range of his late adversary he fired missing his target and wounding four other persons. His aim was wretched despite six years service in the army where, he says, he became a sharpshooter.

At the time of his trial he was 29 years of age.

So it cannot accurately be said that the issues were so complex, or the petitioner was so young, ignorant and inexperienced, as to bring into play the exception to the rule requiring appointment of counsel only in capital cases and to require further inquiry into the procedure culminating in his conviction and sentence. Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367; Uveges v. Com. of Pennsylvania, 335 U.S. 437,

69 S. Ct. 184, 93 L. Ed. 127; Sneed v. Mayo, supra; Butler v. Culver, Fla., 111 So. 2d 35." *McNeal* v. *Culver* (Fla. 1959), 113 So. 2d 381 at 382.

Summary of Argument

The state tried, convicted and imposed a twenty-year sentence on petitioner while he was not represented by counsel. Due process requires counsel for those accused of non-capital crimes whenever special circumstances make trial without counsel unfair. If, for any reason, an accused cannot effectively defend himself; due process puts a lawyer at his side.

The present record shows many special circumstances which made petitioner's trial without counsel unfair. When tried, petitioner was a twenty-nine year old Negro. He was ignorant, inexperienced and mentally ill. The charges he faced involved the interplay between the laws of assault, homicide, and intent. Evidence of his alleged admissions to his arresting officers was used to convict him although such evidence was clearly inadmissible and highly prejudicial. Insanity was a possible defense which passed unnoticed. Finally, the trial judge made no effort to guide petitioner past the errors which make trials without counsel unfair. Not once, during the entire trial, did he stop or even slow the prosecutor's presentation.

The prejudice of the procedure is proved by the punishment imposed. Petitioner received the maximum possible penalty for any type of assault. Yet, the verdict and judgment which confine him do not find him guilty of any known offense in the state's catalog of crimes.

It is not necessary to explore the outer limits of constitutional protection in this area. The state action which

imprisons petitioner is a monstrous affront to the fundamental dignities of mankind. Judged by any standard, it cannot stand.

Argument

Elijah McNeal, Jr., has yet to receive a fair trial. The State action unleashed against this unrepresented man cannot be tolerated in a civilized society. The mere fact that the charges against him were non-capital cannot condone his conviction. Nine years ago this Court could state:

> "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in non-capital criminal cases where there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense. . . . " *Palmer* v. *Ashe*, 342 U.S. 134, 135.

The passage of time has not weakened this rule. Current confirmation is contained in *Cash* v. *Culver*:

> "In the 17 years that have passed since its decision in Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595, this Court, by a traditional process of inclusion and exclusion has, in a series of decisions, indicated the factors which may render state criminal proceedings without counsel so apt to result in injustice as to violate the Fourteenth Amendment. The alleged circumstances of the present case so clearly make it one where, under these decisions, federal organic law required the assistance of counsel that it is unnecessary here to explore the outer limits of constitutional protection in this area.
>
> 'Where the gravity of the crime and other factors—such as the age and education of the defendant, the

conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial. Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437, 441, 69 S. Ct. 184, 186, 93 L. Ed. 127. Of particular relevance here are the decisions of the Court which have held the appointment of counsel necessary to a fair trial because of the complexity of the proceedings. Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367; Gibbs v. Burke, 337 U.S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686; and see Williams v. Kaiser, 323 U.S. 471, 475-476, 65 S. Ct. 363, 366, 89 L. Ed. 398. . . . " (358 U.S. 633, 636-637.)

The present record contains a complete inventory of the special circumstances which make trial without counsel unfair.

1. Youth, Ignorance and Mental Illness

When McNeal stood trial, he was a twenty-nine year old Negro, in court for the first time in his life (R. 2, 7, 9, 41). His claims that he neither knew nor understood court procedure and did not know how to defend himself (R. 2), are conclusively proved by the record. He proved himself incapable of questioning witnesses (R. 28, 32, 34, 36). He sat through the trial without objecting to a single occurrence (R. 24-43). He failed in his one attempt to get a document in evidence (R. 37). When the time for final argument arrived he could not "plead" his case because he did not "quite understand the meaning of that" (R. 43).

Addition of McNeal's mental illness to the picture makes his Florida trial a shocking and a shameful affair. In 1952

he suffered head injuries which left him subject to "black-out spells" (R. 37-38, 42). Four years later, the pathetic creature spends four months locked up in the "psycho" ward of a veterans' hospital (R. 42-43). Finally, he is signed out to the world at large with his mother as his guardian (R. 42-43). He then spends thirteen months taking some kind of pills before he commits his "crime."

McNeal's mentality and mental illness make him no match for the prosecution. Due process puts a lawyer at his side. E.g., *Cash* v. *Culver, supra; Massey* v. *Moore*, 348 U.S. 105; *Palmer* v. *Ashe, supra; Gibbs* v. *Burke*, 337 U.S. 773; *Uveges* v. *Pennsylvania*, 335 U.S. 437; *Townsend* v. *Burke*, 334 U.S. 736; and *Rice* v. *Olson*, 324 U.S. 786.

2. Trial Complexities

Mastery of the substantive issues in McNeal's case requires a synthesis of the Florida laws of assault, homicide and intent. Due process does not require a layman to enter this labyrinth without a lawyer. Cf. *Williams* v. *Kaiser*, 323 U.S. 471; *Tomkins* v. *State of Missouri*, 323 U.S. 485; and *Hawk* v. *Olson*, 326 U.S. 271. In the *Williams* case, this Court said:

> "... The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny. These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the average layman. ..." 323 U.S. at 474-475.

Florida assault law is overrun with distinctions and degrees. Mayhem, bare assault, assault and battery, aggra-

vated assault, culpable negligence and assault with intent to commit felony are all statutory offenses.[1] Assault with intent to commit felony[2] incorporates by reference all Florida felonies and the degrees thereof.

The homicide statutes create four separate offenses—manslaughter,[3] and murder in the first, second and third degree.[4] In considering the interplay between homicide and assault with intent to commit felony, Florida has held that one can be guilty of assault with intent to commit manslaughter, *Lassiter* v. *State*, 98 Fla. 370, 123 So. 735. However, there is no such thing as assault with intent to commit murder in the third degree because this would be "an assault with intent to commit an act without intent". *Tillman* v. *State*, 81 Fla. 558, 88 So. 377, 380.

The requisite "intent" in this area, is stated as follows in *Williams* v. *State*, 41 Fla. 295, 26 So. 184, 185:

> ". . . All unlawful homicides in this state are either murder in the first, second, or third degrees, or manslaughter; but they are all felonies. If, therefore, one assaults another with intent to kill him, and the killing would be unlawful, he has committed an assault with intent to commit a felony, whether the homicide would, if it had been accomplished, have been murder in either degree, or merely manslaughter. The statute under consideration is clearly broad enough to include any felony, and manslaughter is a felony. But upon indictments for assault with intent to commit any of the grades or degrees of unlawful homicide, it will not be sufficient to show that the killing, had it occurred, would

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[1] 2 Fla. Stat. 1957, p. 2800, Secs. 784.01-784.06.

[2] 2 Fla. Stat. 1957, p. 2800, Sec. 784.06.

[3] 2 Fla. Stat. 1957, p. 2798, Sec. 782.07.

[4] 2 Fla. Stat. 1957, p. 2797, Sec. 782.04.

> have been unlawful, and a felony; but it must be found that the accused committed the assault with intent to take life, for, although an unintentional or involuntary killing may in some cases be unlawful, and a felony, no man can intentionally do an unintentional act; and without the intent the assault cannot be punished under this statute, even though the killing, had it been committed, would have amounted to a felony. . . . "

If McNeal fired his shotgun at Scurry, without this felonious "intent to kill", his greatest possible crime would have been aggravated assault—an assault "with a deadly weapon, without intent to kill."[5] This is not an academic distinction for fifteen years' difference in punishment is involved.[6]

INADMISSIBLE ADMISSIONS TO ARRESTING OFFICERS

The state's proof that McNeal "intended to kill Scurry" rested on McNeal's alleged admissions to his arresting officers (R. 31-33). Testimony concerning these alleged admissions was admitted without the slightest inquiry as to whether they were freely and voluntarily made (R. 31-34). This was a patent violation of Florida law. Admissions made to an officer while the accused is under arrest cannot be admitted unless the state *affirmatively* shows their free and voluntary nature. Violation of this rule produced both a reversal and the following statement of the law in *Louette v. State*, 152 Fla. 495, 12 So. 2d 168, 172-173:

> "But there are some jurisdictions which hold that a preliminary showing to the court that no force, threats or inducements were resorted to and that the statement was voluntary, is not necessary. See 22 C.J.S., Criminal

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[5] 2 Fla. Stat. 1957, p. 2800, Sec. 784.04.

[6] Five years is the maximum sentence for aggravated assault. A twenty year sentence can be imposed for assault with intent to commit felony. 2 Fla. Stat. 1957, p. 2800, Secs. 784.04, 784.06.

Law, §732, p. 1250 et seq. However, in the few cases in which this identical question has been discussed and decided in this jurisdiction, we have held that the voluntary character of the admission must be shown before it can be admitted in evidence. Thus in the case of Synes v. State, 78 Fla. 167, 82 So. 778, 780, this court said: 'The rule is settled in this state that where admissions of an incriminating fact are made by the accused to an officer while the accused is in custody charged with crime, such admissions or confessions, although extrajudicial, must appear to have been voluntarily made before admissible in evidence against him.'

• • • • •

"In other words, the rule seems to be that an incriminating admission is admissible, whether made to a private citizen or to an officer, if it is affirmatively shown to have been free and voluntary, although in the latter case, when made to an officer while in custody, the question of voluntariness vel non should be more stringently examined into and slighter evidence of threats or inducements may suffice to exclude it.

Our conclusion therefore is that in this case the court erred in admitting the testimony of officer Fisher as to the highly incriminating admissions made by the defendants, while under arrest and in custody, without first inquiring into the circumstances under which they were made and determining the question as to whether or not they were freely and voluntarily made, uninfluenced by the use of any force, intimidation, coercion or threats, or the holding out of any inducements to them...."

The *Louette* case is still the law. ***Brown*** v. ***State*** (Fla. App. 1959), 111 So. 2d 296; ***Thomas*** v. ***State*** (Fla. 1957), 92 So. 2d 621; ***Williams*** v. ***State*** (Fla. 1954), 74 So. 2d 797.

The admissibility of an accused's admissions to arresting officers raises problems "beyond the ken of a layman" and admissions are "clearly the kind of testimony that could seriously damage a defendant in the eyes of a jury." *Cash* v. *Culver, supra,* 358 U.S. at 638.

POSSIBLE DEFENSES

Had McNeal been defended, insanity might have loomed large at his trial. Under Florida law:

> ". . . All men are presumed sane and when there is no evidence to the contrary a jury may act upon the presumption and determine guilt without concern for the sanity, or insanity, of a defendant. But when there is testimony of insanity sufficient to present a reasonable doubt of sanity the presumption vanishes. The defendant is then entitled to an acquittal if the state does not overcome the reasonable doubt." *Farrell* v. *State* (Fla. 1958), 101 So. 2d 130, 133.

The test of sanity is "whether or not defendant's alleged mental aberration was such as prevented him from distinguishing right from wrong". *Everett* v. *State* (Fla. 1957), 97 So. 2d 241, 245; *Piccott* v. *State* (Fla. 1959), 116 So. 2d 626. McNeal's head injuries, blackout spells, and recent confinement in a "psycho" ward (R. 37, 42-43) cast considerable doubt on his ability to pass this test.

CONVICTION FOR NON-EXISTENT CRIME

McNeal now serves twenty years for a non-existent crime —"Assault to Murder in the Second Degree." Both the verdict and the judgment of conviction use this exact language (R. 22-23). There has never been a finding that McNeal was guilty of "Assault *With Intent* to Murder in the Second Degree." Consequently, there has been no find-

ing that he was guilty of "Assault *With Intent* to Commit Felony" which is the statutory offense.[7]

> "The intent is the gist of the offense, and no one can be punished under this statute for an assault unless it be accompanied with the requisite intent." *Williams v. State*, 41 Fla. 295, 26 So. 184, 185.

Whether the verdict was legally sufficient to support the judgment of conviction is by no means clear. The Florida Supreme Court's *dicta* in *French* v. *State*, 96 Fla. 657, 118 So. 815, 815-816, strongly implies that it is not:

> "In a criminal prosecution the verdict should be responsive to the issues involved; and when the offense charged consists of distinct elements, as of an act committed with a specific intent, a verdict that is not general, as that the defendant is guilty as charged, but specifically finds the defendant guilty of the act, and does not mention the element of intent that is essential to a conviction for the offense charged, and does not make an equivalent finding, the verdict may be legally insufficient to sustain a judgment of conviction, and a judgment rendered thereon as for the offense charged may be reversed even though the legality of the verdict is not specifically challenged by motion in arrest of judgment or by motion for new trial. . . . "

Added support for this view is found in the Florida Statutes,[8] which provide:

> "JUDGMENT ON INFORMAL VERDICT.—If a verdict is rendered from which it can be clearly understood that it is the intention of the jurors to acquit the defendant, .

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[7] 2 Fla. Stat. 1957, p. 2800, Sec. 784.06.

[8] 2 Fla. Stat. 1957, p. 2957, Sec. 921.03.

judgment of not guilty shall be rendered thereon even though the verdict is defective; but, *no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue.*"

McNeal's conviction for a non-existent crime casts considerable doubt on the assertion below that "it cannot accurately be said that the issues were so complex". *McNeal* v. *Culver*, 113 So. 2d at 382.

3. Unrepresented by Counsel, Unprotected by the Court

The record shows a complete lack of concern for Elijah McNeal, Jr., until prison plagiarists[9] filed his potent petition below. The trial judge made little or no effort to guide the unrepresented defendant "past the errors that make trials unfair." *Gibbs* v. *Burke*, 337 U.S. 773, 781.

The record indicts the trial judge. Faced by an ignorant Negro charged with a grave felony, he failed to furnish counsel assuring him "you won't need a Lawyer in this case" (R. 2). When evidence of McNeal's mental illness came before him, he did nothing. Yet, Florida law[10] provides:

"917.01 EXAMINATION OF DEFENDANT'S MENTAL CONDITION TO DETERMINE WHETHER HE SHALL BE TRIED.—(1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has

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[9] McNeal's petition and the Brief for Petitioner in *Cash* v. *Culver*, *supra*, contain paragraphs of identical language. E.g., R. 8-9 of this case and pages 8-9 of Cash's brief before this Court. Cash and McNeal are fellow inmates at Raiford. Cash's brief was written by court-appointed counsel, Irwin L. Langbein, Esq., of West Palm Beach, Florida.

[10] 2 Fla. Stat. 1957, p. 2949, Sec. 917.01(1).

> reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party."

The law of evidence was used by the judge to block McNeal's "testifying" question (R. 28) and his feeble attempt to get a document in evidence (R. 37). Objection by the state was unnecessary. Yet, the same judge sat idly by while the state proved its case with a barrage of leading questions and unresponsive answers (R. 24-36). The accused's alleged admissions to his arrestors came in without any proof of their free and voluntary nature. Yet, such a showing is so vital that the Florida Supreme Court held in *Stiner* v. *State*, 78 Fla. 647, 83 So. 565, 566:

> "While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, that does not relieve the trial judge of the duty when evidence of this character is sought to be introduced to satisfy himself that the admissions were freely and voluntarily made before admitting them. *It is a duty which the law imposes upon the court in order that the prisoner's constitutional right to a fair and impartial trial may be protected and preserved,* and this right should not be made to depend on the skill and alertness of counsel, otherwise courts, instead of being the forum in which justice alone is the object to be attained, would become games played by the respective

counsel and won or lost according to their skill in playing the game according to the rules. . . . "

The record does not reflect a single incident where the judge impeded the prosecutor's presentation.

CONCLUSION

As in Cash's case, "it is unnecessary here to explore the outer limits of constitutional protection in this area." *Cash* v. *Culver, supra,* 358 U.S. at 637. Florida's trial of this ignorant, unbalanced and unrepresented Negro is a monstrous affront to the fundamental dignities of mankind. It cannot stand.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV

§1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

FLORIDA STATUTES IN EFFECT IN 1957

Sec. 782.04 (2 Fla. Stat. 1957, p. 2797, Sec. 782.04)

MURDER:—The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, shall be murder in the first degree, and shall be punishable by death.

When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by imprisonment in the state prison for life, or for any number of years not less than twenty years.

When perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, or kidnaping, it shall be murder in the third degree, and shall be punished by imprisonment in the state prison not exceeding twenty years.

Sec. 782.07 (2 Fla. Stat. 1957, p. 2798, Sec. 782.07)

MANSLAUGHTER.—The killing of a human being by the act, procurement or culpable negligence of another,

in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars.

Sec. 784.01 (2 Fla. Stat. 1957, p. 2800, Sec. 784.01)

MAYHEM:—Whoever, with malicious intent to maim or disfigure, cuts or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits or mutilates the nose or lip, or cuts off or disables a limb or member of any other person, and whoever is privy to such intent, or present, aiding or abetting in the commission of such offense, shall be punished by imprisonment in the state prison not exceeding twenty years or by fine not exceeding five thousand dollars.

Sec. 784.02 (2 Fla. Stat. 1957, p. 2800, Sec. 784.02)

PUNISHMENT OF ASSAULT.—Whoever commits a bare assault shall be punished by a fine not exceeding one hundred dollars.

Sec. 784.03 (2 Fla. Stat. 1957, p. 2800, Sec. 784.03)

PUNISHMENT OF ASSAULT AND BATTERY.—Whoever commits assault and battery shall be punished by imprisonment not exceeding six months, or by fine not exceeding five hundred dollars.

Sec. 784.04 (2 Fla. Stat. 1957, p. 2800, Sec. 784.04)

AGGRAVATED ASSAULT.—Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding three thousand dollars, or by both such fine and imprisonment.

Sec. 784.05 (2 Fla. Stat. 1957, p. 2800, Sec. 784.05)

PUNISHMENT FOR CULPABLE NEGLIGENCE.—Whoever through culpable negligence, or a reckless disregard for the safety of others, inflicts any personal injury or injuries upon another, not resulting in death, shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding one thousand dollars.

Sec. 784.06 (2 Fla. Stat. 1957, p. 2800, Sec. 784.06)

ASSAULT WITH INTENT TO COMMIT FELONY.—Whoever commits an assault on another, with intent to commit any felony punishable with death or imprisonment for life, shall be punished by imprisonment in the state prison not exceeding twenty years. An assault with intent to commit any other felony shall be punished to an extent not exceeding one-half the punishment which could have been inflicted had the crime been committed.

Sec. 917.01 (2 Fla. Stat. 1957, p. 2949, Sec. 917.01)

EXAMINATION OF DEFENDANT'S MENTAL CONDITION TO DETERMINE WHETHER HE SHALL BE TRIED. . . . (1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

(2) If the court, after the hearing, decides that the defendant is sane, it shall proceed with the trial. If, however, it decides that the defendant is insane, it shall take proper steps to have the defendant committed to the proper institution. If the defendant is declared insane during the trial, and afterwards released

from the institution to which he has been committed, as sane, his former uncompleted trial shall not constitute former jeopardy. If, after a defendant has been committed to an institution as insane, the proper officer of such institution is of the opinion that the defendant is sane, he shall report this fact to the court which conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is sane. This hearing shall be conducted in all respects like the original hearing to determine the defendant's sanity. If found sane, the trial shall proceed; if found insane, he shall again be recommitted as hereinabove set forth. No defendant committed by a court to an institution, by reason of the examination referred to in this paragraph, shall be released therefrom, without the consent of the court committing him.

Sec. 921.03 (2 Fla. Stat. 1957, p. 2957, Sec. 921.03)

JUDGMENT ON INFORMAL VERDICT.—If a verdict is rendered from which it can be clearly understood that it is the intention of the jurors to acquit the defendant, judgment of not guilty shall be rendered thereon even though the verdict is defective; but no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue.